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No. 91-1549

In the Supreme Court of the United States

OCTOBER TERM, 1991

NEW YORK STATE DEPARTMENT OF HEALTH,
PETITIONER

v.

JOANNA ANDRULONIS, ETC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. 2680(a), protects the federal government from liability for the failure of a federally employed scientist, who was observing an experiment conducted by a state employee in a state medical research facility, to stop the experiment because of safety risks.

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OPINIONS BELOW

The opinion of the court of appeals on remand from this Court (Pet. App. A406-A415) is reported at 952 F.2d 652. This Court's decision remanding the case for reconsideration (Pet. App. A405) is reported at 112 S. Ct. 39. The court of appeals' original decision (Pet. App. A1-A45) is reported at 924 F.2d 1210. The opinion of the district court (Pet. App. A46-A389) is reported at 724 F. Supp. 1421. A related opinion of the district court (Pet. App. A390-398) is reported at 593 F. Supp. 1336.

JURISDICTION

The judgment of the court of appeals was entered on December 30, 1991. The petition was filed on March 25, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Jerome Andrulonis was an employee of the New York State Department of Health, conducting rabies research under the direction of Dr. John G. Debbie. Debbie planned some of his research in collaboration with Dr. George M. Baer, Chief of the Viral Zoonosis Branch and Rabies Laboratory at the Center for Disease Control (CDC), a division of the United States Department of Health and Human Services located in Atlanta, Georgia. This case arises out of an experiment Debbie and Andrulonis conducted in an attempt to produce an oral rabies vaccine that could be administered to animals in the wild. Pet. App. A6-A7.

In order to conduct the experiment, Debbie needed a certain type of rabies virus, which Baer produced and brought to Debbie's laboratory in New York. The experiment involved an attempt to prepare pills coated with the rabies virus. Because the machine used to coat the pills was not entirely airtight, Andrulonis was exposed to the virus. Baer observed the experiment and apparently knew the machine was not airtight, but neither advised the New York scientists that he thought this was abnormally dangerous, nor otherwise intervened to stop the experiment. The lower courts concluded that this incident caused Andrulonis to contract rabies. Pet. App. A9-A10, A12-A13.

2. Andrulonis and his family were unable to sue New York in tort because New York's workers' compensation law provides the exclusive remedy for injuries of this kind. See Pet. App. A181. They did, however, commence this action in the United States District Court for the Southern District of New York, contending that the United States was liable under the Federal Tort Claims Act (FTCA). The United

States brought the State of New York into the suit, contending that New York was responsible for any liability imposed on the United States.[1]

The district court partially accepted and partially rejected the contention of the United States that it was insulated from liability by the "discretionary function" exception to the FTCA set forth in 28 U.S.C. 2680(a).[2] The district court refused to impose liability based upon Dr. Baer's decision to encourage and aid the research by New York employees, and concluded that Dr. Baer's duty to warn the New York employees of the specific hazards of the virus he supplied to them was met as of the time he delivered the virus. The court also found, however, that Dr. Baer, upon viewing the New York experiment, should have advised the New York scientists that they were conducting the experiment in an unsafe manner; the court held that the discretionary function exception did not protect the United States from liability for Dr. Baer's failure to do so. Pet. App. A260-A262. The district court entered a judgment against the United States for approximately $6.4 million, but held that the

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[1] Even though Andrulonis could not sue New York directly because of the exclusivity of the workers' compensation remedy, it was permissible under New York law for the United States to bring a third-party action against New York seeking contribution for any damages imposed on the United States. See Pet. App. A181-A182.

[2] Section 2680(a) provides in pertinent part that the United States is not liable for

> [a]ny claim based upon an act or omission of an employee of the Government * * * based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

United States was entitled to recover approximately $3.7 million of the judgment from New York because of the State's role in the experiment. *Id.* at A354-A355.

3. On appeal, the court of appeals affirmed the district court's application of the discretionary function exception to the FTCA. The court relied on this Court's decision in *Indian Towing Co.* v. *United States*, 350 U.S. 61 (1955), to support the conclusion that the discretionary function exception generally applies only at the level at which policy decisions are made, and not at the level at which those decisions are implemented. Pet. App. A19-A20. It also suggested that decisions at the implementation level are protected only if the employees are "specifically empowered to make policy judgments." *Id.* at A21 (quoting *United States* v. *S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 820 (1984)). Because Dr. Baer's failure to warn of the dangers of the experiment "did not lend itself to policy balancing," and because there was no "indication that Dr. Baer considered the policy implications or the pros and cons of allowing the experiment to proceed," the court concluded that the discretionary function exception should not protect the government. Pet. App. A22.

Finally, the court of appeals rejected the government's argument that this Court's decision in *Dalehite* v. *United States*, 346 U.S. 15 (1953), supported application of the discretionary function exception to conduct at the operational level. The court argued that the only cognizable negligence in *Dalehite* had been at the policy-making level where the program was instituted, so that the Court's decision that the government was not liable in *Dalehite* did not support

the government's contention that the discretionary function exception protected conduct at the operational level. Pet. App. A22-A23.

Although it affirmed all other substantive aspects of the district court's decision, the court of appeals reversed a portion of the district court's decision regarding the effect on the damage award against New York and the United States of settlements other defendants had made before trial. On that issue the court remanded the case to the trial court with instructions to recalculate the damage award. Pet. App. A33-A41.

4. New York petitioned for review in this Court; although the United States did not seek review, we filed a brief in response to New York's petition suggesting that the Court vacate the decision of the court of appeals and remand for further consideration in light of this Court's decision in *United States* v. *Gaubert*, 111 S. Ct. 1267 (1991). We pointed out that this Court's decision in *Gaubert* substantially undermined the court of appeals' reliance on *Indian Towing* to support its conclusion that the discretionary function exception did not apply to operational activities that did not involve policy-making.[3] Similarly, we pointed out that *Gaubert* undermined the court of appeals' suggestion that the United States should be liable unless regulations *required* Dr. Baer to consider particular policies before he failed to warn the New York scientists.[4] See 90-1864 U.S. Br. at

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[3] See *Gaubert*, 111 S. Ct. at 1275 (referring to "a nonexistent dichotomy between discretionary functions and operational activities").

[4] See *Gaubert*, 111 S. Ct. at 1274 (explaining that the discretionary function exception protects the government when "established governmental policy, as expressed or implied by

5-8. The Court subsequently vacated the judgment of the court of appeals and remanded the case to that court for further consideration in light of *Gaubert*. Pet. App. A405.

5. On remand, the court of appeals reinstated its earlier decision, explaining that the decisions made by Dr. Baer in this case, unlike the decisions at issue in *Gaubert*, implicated no significant policy concerns of his federal employer. Pet. App. A406-A415. The court determined that the CDC did not "have a policy to keep silent about obvious, easily-correctable dangers in experiments using drugs supplied by the CDC." *Id.* at A414. Accordingly, in the court's view, the discretionary function exception was not applicable, because Dr. Baer's "negligent omission [did not] implicate any policy considerations." *Ibid.* Comparing Dr. Baer's failure to warn New York State scientists with the classic example of unprotected conduct —negligent automobile driving—the court of appeals concluded that Dr. Baer's conduct was not protected by the discretionary function exception. Accordingly, it reinstated its judgment affirming liability and remanding the case to the district court for further proceedings regarding the effect of previous settlements on the terms of the judgment. *Id.* at A415.[5]

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statute, regulation, or agency guidelines, allows a Government agent to exercise discretion").

[5] Because this case will return to the district court for modification of the judgment, the case is not final in all respects. This does not affect the jurisdiction of the Court. See Robert L. Stern et al., *Supreme Court Practice* § 2.2, at 41 (6th ed. 1986). It is true that New York or the United States (which did not petition from this interlocutory judgment) could raise the claims presented in the petition New York has filed in another petition seeking review of any final judgment the district court may enter on remand. See *ibid.* We believe,

ARGUMENT

As we explain above, and stated in our previous filing in this matter, we have serious doubts about the analysis of the court of appeals in this case. In our view, the court of appeals' opinion on remand does little to reconcile its decision with *Gaubert*. In particular, we continue to believe that the discretionary function exception "protects the government when 'established governmental policy, as expressed or implied by statute, regulation, or agency guidelines, *allows* a Government agent to exercise discretion,' because 'it must be presumed that the agent's acts are grounded in policy when exercising that discretion.' " 90-1864 U.S. Br. at 6-7 (quoting *Gaubert*, 111 S. Ct. at 1274) (emphasis added). Accordingly, we agree with New York (see, *e.g.*, Pet. 16) that the court of appeals improperly concluded that the discretionary function exception could not protect Dr. Baer's conduct simply because CDC did not have "a regulatory framework" or "a defined policy" with respect to the duty to warn state-employed scientists.

We do not agree, however, with New York's statement (Pet. 17) that the court of appeals has created a conflict in the circuits by reading the discretionary function exception "so narrowly that mere common law negligence is not covered by the exception." Rather, the court of appeals has concluded that the conduct *in this case* was not protected because the discretion to act or not to act was not guided by any

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though, that the lack of finality should not be dispositive in evaluating the petition in this case, because the proceedings remaining in the district court are unlikely to affect the legal question presented by the petition. Cf. *Pope* v. *Atlantic Coast Line R.R.*, 345 U.S. 379, 382 (1953) (expressing a similar view in a case seeking review of the judgment of a state court).

previously articulated government policy. See Pet. App. A414 (exception does not apply because "we have neither a regulatory framework nor a defined policy that could serve as the basis for infusing all decisions of CDC employees with policy implications"). Although we believe that rule is incorrect, and in substantial tension with this Court's analysis in *Gaubert*, we do not believe that it conflicts with any of the cases cited in New York's petition. As New York explains (see Pet. 21), those cases simply stand for the proposition that an FTCA action criticizing the "errors or omissions" of a government employee can be dismissed if the error or omission was "discretionary"; they do not speak to the issue of whether the error or omission involved here was discretionary.

We therefore adhere to our view—reflected in our decision not to seek review from either of the court of appeals' opinions in this matter—that this case is not a suitable vehicle for further plenary examination of the discretionary function exception. The decision below was based largely on the relatively unusual and complicated facts of this case, which are far afield from the standard fare of FTCA cases and cannot be expected to recur often. Thus, we doubt that review of the way in which the discretionary function exception applies here will aid materially in the application of that exception in other cases.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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